

REPORT

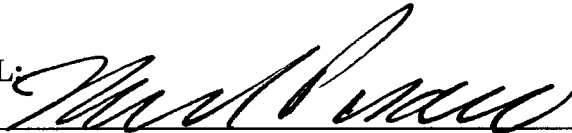
DATE: January 5, 2005

TO: Regional Council

FROM: Energy and Environment Committee
Jacob Lieb, Acting Lead Regional Planner, (213) 236-1921, lieb@scag.ca.gov

SUBJECT: "Underground Rulemaking"

EXECUTIVE DIRECTOR'S APPROVAL:



RECOMMENDED ACTION:

Support legislation to clarify "underground rulemaking."

SUMMARY

The Energy and Environment Committee and the Solid Waste Task Force recommend support for legislation to clarify the Administrative Procedures Act regarding "underground rulemaking." Existing State Law prohibits State agencies from making regulations without adequate public disclosure and review. AB 1351, prior to being amended and vetoed in the last legislative session, would have closed loopholes in the existing law that have allowed agencies to circumvent these requirements. The committee recommends that SCAG support the improvements that had been proposed in AB 1351.

BACKGROUND:

AB 1351 (Vargas), as of February 2005, would have provided clarification to the Administrative Procedures Act such that State agency actions having the effect of regulations would be subject to the act. As such, bulletins, guidelines, procedures, and other types of documents could not be used in order to avoid the rule making process. "Underground rulemaking" is of concern to the Solid Waste Task Force due to various practices of the California Integrated Waste Management Board. The bill would also have provided additional resources to the Office of Administrative Law to enforce provisions of the Administrative Procedures Act.

The Solid Waste Task Force recommended that SCAG send a letter to the Governor's office requesting that the concepts included in AB 1351 be pursued in the next legislative year.

FISCAL IMPACT:

All work related to adopting the recommended staff action is contained within the adopted FY05/06 budget and adopted 2005 SCAG Legislative Program and does not require the allocation of any additional financial resources.

Attachment:

Text of AB 1351 prior to amendments

AMENDED IN SENATE JULY 7, 2005

AMENDED IN SENATE JUNE 27, 2005

AMENDED IN ASSEMBLY APRIL 28, 2005

AMENDED IN ASSEMBLY APRIL 13, 2005

california legislature 2005 06 regular session

ASSEMBLY BILL

No. 1351

Introduced ~~Assembly~~ Member ~~Vargas~~

February 22, 2005

An act to amend ~~Section 11340.5 of, and to add Section~~
11340.5, 11346.1, and 11349.6 of, and to add Sections 11342.545 and
11342.620 to, the Government Code, relating to state agencies.

legislative counsel/gest

AB 1351, as amended ~~Vargas~~ Office of Administrative Law:
regulations.

Existing law prohibits a state agency from issuing, utilizing, enforcing, or attempting to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, unless it has been adopted as a regulation and filed with the Secretary of State. Under existing law, if the Office of Administrative Law is notified, or learns on its own, that an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has not been adopted as a regulation and filed with the Secretary of State, the office may issue a determination as to whether it is a regulation. Existing law also authorizes any interested person to obtain a judicial declaration as to the validity of any regulation.

This bill would provide that any guideline, criterion, bulletin, provision in a manual, instruction, order, standard of general application, or other rule that is a regulation but is not adopted as a regulation and filed with the Secretary of State constitutes an underground regulation and would establish a procedure for any interested person with information that a state agency has issued, used, enforced, or attempted to enforce an underground regulation to petition ~~Office of Administrative Law~~ a determination that this agency action is an underground regulation. It would require the office, within 30 days after receiving a petition, to decide whether or not to consider the petition on its merits and would make this decision not subject to judicial review. It also would provide that, if the office decides to consider the petition on its merits, then the office is required, no later than 150 days after public notice of this petition, to determine whether the agency action is an underground regulation. It also would suspend these requirements connected with a petition if the agency issuing the alleged underground regulation certifies that it will not issue, use, enforce, or attempt to enforce the regulation. It also would provide that filing a petition pursuant to these provisions is not required prior to bringing an action in superior court seeking judicial declaration on the validity of a regulation.

Existing law provides that, if a state agency makes a finding that the adoption of a regulation or order of repeal is necessary for the immediate preservation of the public peace, health and safety or general welfare, the regulation or order of repeal may be adopted as an emergency regulation or order of repeal. Under existing law, a regulation, amendment, or order of repeal adopted as an emergency regulation remains in effect ~~nd 20 days~~ unless the adopting agency complies with certain requirements.

This bill would require an agency that is adopting an emergency regulation to mail at least 5 working days prior to submission of an emergency regulation to the office a notice of proposed emergency action to every person who has filed a request for notice of regulatory action with the agency unless the emergency situation clearly poses such an immediate, serious harm that delaying action to allow public comment would be inconsistent with the public interest. The bill would extend to 180 days the maximum period of time a regulation, amendment, or order of repeal initially adopted as an emergency regulation. The bill would authorize the office to approve one readoption of an emergency regulation period not to exceed 90

days, as specified. The bill would require the office, after posting a notice of the filing of a proposed regulation on its Web site, to allow interested persons 5 calendar days to submit comments on the proposed emergency regulations unless delaying action to allow public comment would be inconsistent with the public interest.

Vote: majority Appropriations Committee yes.
 State mandated program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 11340.5 of the Government Codes
 2 amended to read:
 3 11340.5(a) No state agency shall issue, use, enforce, or
 4 attempt to enforce any underground regulation as defined in
 5 Section 11342.620.
 6 (b) Any interested person with information that a state agency
 7 has issued, used, enforced, or attempted to enforce an
 8 underground regulation as defined in Section 11342.620 may
 9 petition the office for a determination that a particular guideline,
 10 criterion, bulletin, provision in a manual, instruction, order,
 11 standard of general application, or other rule or procedure is an
 12 underground regulation. For purposes of this subdivision, an
 13 interested person shall not include a state agency. The petition
 14 shall include all of the following:
 15 (1) The name and contact information of the petitioner.
 16 (2) The name and contact information of the agency that has
 17 allegedly issued, used, enforced, or attempted to enforce an
 18 underground regulation.
 19 (3) A complete description of the particular underground
 20 regulation, and a copy of any written expression of the
 21 underground regulation.
 22 (4) A description of the actions of the agency evidencing that
 23 it has issued, used, enforced, or attempted to enforce the
 24 underground regulation.
 25 (5) The legal basis for concluding that the guideline, criterion,
 26 bulletin, provision in a manual, instruction, order, standard of
 27 general application, or other rule or procedure is a regulation as
 28 defined in Section 11342.600 and that no express statutory
 29 exemption to the requirements of this chapter is applicable.

1 (6)Information demonstrating that the petition raises an issue
2 of considerable public importance requiring prompt resolution.
3 (c)Upon the filing of the petition, the petitioner shall submit a
4 copy of the petition and all attachments to the agency.
5 (d)(1)No later than 30 days after receipt of a complete
6 petition filed pursuant to subdivision (b), the office shall
7 determine whether or not to consider the petition on its merits, in
8 its entirety or in part, unless, prior to the end of the 30-day
9 period, the agency submits to the office a certification pursuant to
10 subdivision (i). If the office declines to consider the petition, it
11 shall immediately advise the petitioner and the agency of the
12 decision and specifically indicate that the decision in no way
13 reflects on the merits of the underlying issue presented by the
14 petition. A decision by the office under this paragraph, to
15 consider or not to consider a petition on its merits, is not subject
16 to judicial review. A decision under this paragraph shall also not
17 be considered by a court in any action seeking judicial review of
18 a claimed violation of subdivision (a).
19 (2)If the office decides to consider the petition on its merits, it
20 shall notify the petitioner and the agency of this decision and
21 shall publish the petition or a summary of the petition in the next
22 California Regulatory Notice Register, giving notice to the public
23 that comments on issues raised by the petition may be submitted
24 to the office. Any person submitting comments to the office shall
25 simultaneously provide a copy of the comments to the agency.
26 The agency shall submit to the office a response to the petition
27 and shall serve a copy of any response to the petition on the
28 petitioner. The petitioner may submit a reply to the agency's
29 response to the office and to the agency after being served with
30 that response.
31 (3)After the time for the petitioner to submit a reply to the
32 agency's response, and no later than 150 days after publication of
33 the accepted petition in the California Regulatory Notice
34 Register, the office shall issue a determination as to whether or
35 not the particular guideline, criterion, provision in a manual,
36 instruction, order, standard of general application, or other rule or
37 procedure is an underground regulation.
38 (e)Upon issuing a determination pursuant to paragraph (3) of
39 subdivision (d), the office shall do all of the following:
40 (1)File its determination with the Secretary of State.

1 (2)Make its determination known to the agency, the
2 Governor, and the Legislature.
3 (3)Publish its determination in the California Regulatory
4 Notice Register within 15 days of the date of issuance.
5 (4)Make its determination available to the public and the
6 courts.
7 (f)Any interested person may obtain judicial review of a
8 determination issued pursuant to paragraph (3) of subdivision (d)
9 by filing a written petition requesting that the determination of
10 the office be modified or set aside. A petition shall be filed with
11 the court within 90 days of the date the determination is
12 published.
13 (g)A determination issued by the office pursuant to this
14 section shall not be considered by a court, or by an administrative
15 agency in an adjudicatory proceeding if all of the following
16 occurs:
17 (1)The court or administrative agency proceeding involves the
18 party that sought the determination from the office.
19 (2)The proceeding began prior to the party's request for the
20 office's determination.
21 (3)At issue in the proceeding is the question of whether the
22 particular guideline, criterion, bulletin, provision in a manual,
23 instruction, order, standard of general application, or other rule or
24 procedure that is the legal basis for the adjudicatory action is a
25 regulation as defined in Section 11342.600 or an underground
26 regulation as defined in Section 11342.620.
27 (h)The office shall adopt regulations to implement this
28 section, which shall include regulations specifying the time to
29 file comments on a petition, responses, and replies, and which
30 may include, but not be limited to, the following:
31 (1)Authorizing a party who filed comments on a petition to
32 submit a reply to the agency's response to the petition.
33 (2)Authorizing the office to extend the time for an agency to
34 file a response to a petition if the agency is a state body as
35 defined in Section 11121 and the agency's response requires
36 action taken at a meeting subject to Article 9 (commencing with
37 Section 11120) of Chapter 1.
38 (i)Any action required of the office or an agency by this
39 section in connection with a petition shall be suspended if the
40 office receives a certification from the agency that it will not

1 issue, use, enforce, or attempt to enforce the alleged underground
2 regulation along with proof that the certification has been served
3 on the petitioner. This certification shall be made by the head of
4 the agency or a person with a written delegation of authority
5 from the head of the agency in the form specified by Section
6 2015.5 of the Code of Civil Procedure. Upon receipt of this
7 certification and proof of service, the office shall do all of the
8 following:

9 (1)File the petition and the certification with the Secretary of
10 State.

11 (2)Publish a summary of the petition and the certification in
12 the California Regulatory Notice Register.

13 (3)If the certification is received after the petition or summary
14 of the petition has been published in the California Regulatory
15 Notice Register, make the petition and certification known to the
16 Governor and the Legislature.

17 (j)The filing of a petition pursuant to this section is not
18 required prior to seeking judicial review of a claimed violation of
19 subdivision (a) and nothing in this article is intended to limit the
20 ability of an interested person to seek judicial review pursuant to
21 Section 11350.

22 SEC. 2Section 11342.545 is added to the Code
23 to read:

24 11342.545For purposes of adopting a regulation pursuant
25 to Section 11346.1, emergency means a situation not foreseen
26 in sufficient time to proceed in accordance with the provision of
27 Article 5 (commencing with Section 11346) that apply to
28 nonemergency regulations and that calls for immediate action to
29 avoid serious harm evidenced by an imminent and substantial
30 threat to the public peace, health, safety, or general welfare.
31 Emergency does not mean expediency, convenience, best
32 interest, or general public need, and it cannot be based on
33 speculation.

34 ~~SEC. 2.~~

35 SEC. 3Section 11342.620 is added to the Code
36 to read:

37 11342.620Underground regulation means any guideline,
38 criterion, bulletin, provision in a manual, instruction, order,
39 standard of general application, or other rule or procedure that is
40 a regulation as defined in Section 11342.600, but has not been

1 adopted as a regulation and filed with the Secretary of State
2 pursuant to this chapter.

3 SEC. 4 Section 11346.1 of the Government Code is amended
4 to read:

5 11346.1(a)(1) The adoption, amendment, or repeal of an
6 emergency regulation is not subject to any provision of this
7 chapter except this section and Section 11349.6.

8 (2) At least five working days before submitting an emergency
9 regulation to the office, the adopting agency shall, except as
10 provided in paragraph (3), mail a notice of the proposed
11 emergency action to every person who has filed a request for
12 notice of regulatory action with the agency. The notice shall
13 describe all of the following:

14 (A) The proposed regulatory action.

15 (B) The specific regulatory language proposed to be adopted.

16 (C) The factual and evidentiary basis for the emergency and
17 the need for immediate action.

18 (D) The statutory authority for adopting the regulation.

19 (E) The law being implemented, interpreted, or made specific.

20 (F) The basis for proposing the specific regulation to address
21 the emergency.

22 (3) An agency is not required to provide notice pursuant to
23 paragraph (2) if the emergency situation clearly poses such an
24 immediate, serious harm that delaying action to allow public
25 comment would be inconsistent with the public interest.

26 (b)(1) Except as provided in subdivision (c), if a state agency
27 makes a finding that the adoption of a regulation or order of
28 repeal is necessary for the immediate preservation of the public
29 peace, health and safety or general welfare, the regulation or
30 order of repeal may be adopted as an emergency regulation or
31 order of repeal.

32 ~~Any~~
33 (2) Any finding of an emergency shall include a written
34 statement which contains the information required by
35 paragraphs (2) to (6), inclusive, of subdivision (a) of Section
36 11346.5 and a description of the ~~specific~~ facts
37 demonstrating the existence of an ~~emergency~~ and
38 immediate action and demonstrating, by substantial evidence,
39 the need for the proposed regulation to effectuate the statute
40 being implemented, interpreted, or made specific and to address

1 only the demonstrated emergency finding of emergency
 2 shall also identify each technical, theoretical, and empirical
 3 study, report, or similar document, if any, upon which the agency
 4 relies. The enactment of an urgency statute shall not, in and of
 5 itself, constitute a need for immediate action.

6 The
 7 (3) The statement and the regulation or order of repeal shall be
 8 filed immediately with the office.

9 (c) Notwithstanding any other provision of law, no emergency
 10 regulation that is a building standard shall be filed, nor shall the
 11 building standard be effective, unless the building standard is
 12 submitted to the California Building Standards Commission, and
 13 is approved and filed pursuant to Sections 18937 and 18938 of
 14 the Health and Safety Code.

15 (d) The emergency regulation or order of repeal shall become
 16 effective upon filing or upon any later date specified by the state
 17 agency in a written instrument filed with, or as a part of, the
 18 regulation or order of repeal.

19 (e) No regulation, amendment, or order of repeal
 20 adopted as an emergency regulatory action shall remain in effect
 21 more than 180 days unless the adopting agency has complied
 22 with Sections 11346.2 to 11347.3, inclusive, either before
 23 adopting an emergency regulation ~~120-day~~ 180-day
 24 period. The adopting agency, prior to the expiration of the
 25 ~~120-day~~ 180-day period, shall transmit to the office for filing
 26 with the Secretary of State the adopted regulation, amendment, or
 27 order of repeal, the rulemaking file, and a certification that
 28 Sections 11346.2 to 11347.3, inclusive, were complied with
 29 either before the emergency regulation was adopted or within the
 30 ~~120-day~~ 180-day period.

31 (f) ~~In the event~~ an emergency amendment or order of repeal
 32 is filed and the adopting agency fails to comply with subdivision
 33 (e), the regulation as it existed prior to the emergency
 34 amendment or order of repeal shall thereupon become effective
 35 and after notice to the adopting agency by the office shall be
 36 reprinted in the California Code of Regulations.

37 (g) ~~In the event~~ a regulation is originally adopted and filed
 38 as an emergency and the adopting agency fails to comply with
 39 subdivision (e), this failure shall ~~constitute~~ be a repeal

1 regulation and after notice to the adopting agency by the office,
2 shall be deleted.

3 (h) The office shall not file an emergency regulation with the
4 Secretary of State if the emergency regulation is the same as or
5 substantially equivalent to an emergency regulation previously
6 adopted by that agency, ~~unless the office expressly~~
7 approves the agency's readoption of the emergency regulation.
8 The office may approve one readoption of the emergency
9 regulation for a period not to exceed 90 days if the agency has
10 made substantial progress and proceeded with diligence to
11 comply with subdivision (e).

12 SEC. 5 Section 11349.6 ~~Conference Code~~ amended
13 to read:

14 11349.6(a) ~~In the event~~ the adopting agency has complied
15 with Sections 11346.2 to 11347.3, inclusive, prior to the adoption
16 of the regulation as an emergency, the office shall approve or
17 disapprove the regulation in accordance with this article.

18 (b) Emergency regulations adopted pursuant to subdivision (b)
19 of Section 11346.1 shall be reviewed by the office within 10
20 calendar days after their submission to the office.
21 notice of the filing of a proposed emergency regulation on its
22 Website, the office shall ~~enable~~ persons five calendar
23 days to submit comments on the proposed emergency regulations
24 unless the emergency situation clearly poses such an immediate
25 serious harm that delaying action to allow public comment would
26 be inconsistent with the public interest. ~~The office shall not file~~
27 the emergency regulations with the Secretary of State if it
28 determines that the regulation is not necessary for the immediate
29 preservation of the public peace, health and safety, or general
30 welfare, or if it determines that the regulation fails to meet the
31 standards set forth in Section 11349.1, or if it determines the
32 agency failed to comply with ~~subdivisions (b) and (c) of~~
33 11346.1.

34 (c) If the office considers any information not submitted to it
35 by the rulemaking agency when determining whether to file
36 emergency regulations, the office shall provide the rulemaking
37 agency with an opportunity to rebut or comment upon that
38 information.

39 (d) Within 30 working days of the filing of a certificate of
40 compliance, the office shall review the regulation and hearing

- 1 record and approve or order the repeal of an emergency
- 2 regulation if it determines that the regulation fails to meet the
- 3 standards set forth in Section 11349.1, or if it determines that the
- 4 agency failed to comply with this chapter.

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